IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1976

76-1073

CHARLES W. PARRISH, JR., Petitioner

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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CITATIONS

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner herein, Charles W. Parrish, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on November 19, 1976, and supplemented by the Order and Opinion of the Fourth Circuit entered on January 4, 1977, related to and denying a Petition for Rehearing, all of which affirmed the denial of this Motion to Withdraw Guilty Plea and Motion to Set Aside or Vacate Sentence without any hearing based upon the statements made by the Court to Mr. Parrish and counsel at the time of his first Plea, contradicted in his post-trial Motions.

OPINIONS BELOW

The trial Court's denial of Petitioner's Motion to Withdraw Guilty Plea and Motion to Vacate is unreported. The transcript is appended, Pet.App.5-6. The original two page Opinion and Judgment of the Fourth Circuit Court of Appeals, reprinted in the Appendix as App. 1-3 is an unpublished Opinion decided on November 19, 1976, affirming the action in the District Court. The Court of Appeals denied a Petition for Rehearing and/or Suggestion for Rehearing En Banc by its Order dated December 30, 1976, but entered January 4, 1977, Pet.App. 4.

JURISDICTION

The Judgment of the Court of Appeals of the Fourth Circuit was entered on November 19, 1976. A timely Petition for Rehearing and/or Suggestion for Rehearing En Banc was thereafter filed, after which the Court of Appeals denied those Petition by its order of January 4, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1), and Rule 22 (2).

QUESTIONS PRESENTED

1. Whether under Federal Criminal Rule 32d, on a Motion to Withdraw a Guilty Plea after sentence, or Motion to Vacate under 28 U.S.C. 2255, an evidentiary hearing may be denied on the basis of the Rule 11 proceeding where there is a post sentence claim of innocence, and a claim of no intelligent waiver, and a claim of mental difficulties.

2. Whether the term "manifest injustice" under Federal Criminal Rule 32d goes sufficiently beyond constitutional minima to require an evidentiary hearing or a granting the Motion or a shift of the burden where there is a post plea claim of innocence resting on legal principles not known to the defendant at the time.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules herein are: Constitution of the United States, Amendments IV, V and VI; and United States Code, Title 18, Sections 1014 which is the charged violation, and Federal Rules of Criminal Procedure, Rules 32 and 11 and Title 28 U.S.C. Section 2255.

STATEMENT OF THE CASE

The proceedings below reflect the following: On January 6, 1976, Mr. Charles Parrish, Jr. was indicted in the Federal Court in Alexandria, Virginia, for violations of 18 USC § 1014 in making "materially false" statements for a loan with the Commonwealth Bank & Trust Company, the false statements consisting of representations as to his being a DuPont heir and the beneficiary of a trust valued at $5,500,000 (Court I), and reflecting a net worth of $21,000,000 and assets of $35,000,000 (Court II); and at another time a net worth of $6,000,000 and assets of $8,000,000 (App. 1, docket entries; App. 3-4, Indictment) (All references are to the Record and Appendix in the Fourth Circuit where "App." appears.)

Mr. Parrish was first arraigned on January 19 with appointed counsel and thereafter, on January 26, with retained counsel (App. 1). About three weeks later on February 13, before Judge Albert V. Bryan, Jr. he entered a plea of guilty to Count I; Counts II and III related to the same alleged bank arrangements as Count I, were dismissed (App. 2; 23-26). On March 12, he came on for sentencing and was committed to the maximum permissible under the charges . . . two years in jail (App. 2; App. 48). Ten days later, on March 22, 1976, Mr. Parrish filed a verified Motion for Withdrawal of Plea of Guilty, a verified Motion to Set Aside or Vacate the Sentence, an affidavit of a third person (Ann Devereux) in support of that Motion and his Memorandum of Points and Authorities and other related Motions. (App. 2; 5-14).

Mr. Parrish subpoenaed various bank and FBI records for the motion hearing scheduled on April 9, all of which were quashed by the Court in its ruling on April 8, one day before the withdrawal and vacating motions were scheduled (App. 3; App. 51-61, hearing; App. 80-83, subpoena). A short hearing on the basic Motions was held the next day, Friday, April 9 (App. 62-79, complete hearing). No evidence was taken. The Court denied the relief sought (App. 3; App. 76-78). We attach to this Petition that oral ruling, the substance of which was two-fold: at the Rule 11 Plea Hearing, Mr. Parrish did not, as in his Motions, claim innocence and thus was barred from claiming it in a Rule 32 or Section 2255 hearing; and further, even though his issues were arguable, as the trial Court noted, he knew or should have known with counsel better than anyone else whether he was guilty. Also without hearing, the trial Court denied all claim of mental difficulties alluded to in the post-plea affidavit. (Pet. App. 5-6).

The Fourth Circuit without expressly noting the crucial point that there was no evidentiary hearing on the disputed and "arguable" issues referred only to the Rule 11 proceeding rather than the record and new verified evidence in the 32d - 2255 proceeding; and it affirmed. (See Opinion this Petition Appendix 1-3.)

The pertinent "evidence" on this appeal does not involve conflicts resolved by a Court or jury determination. Since no evidentiary hearing was held below, the most significant facts are those in documents -- in verified Motions, in affidavits, in an Indictment, in a Plea and Sentence hearing, in rulings suppressing documents and in docket entries.

The first "fact" of moment in the Indictment, which, as we have observed, consisted of three Counts, involving three differently-stated "financial statements" given to one bank in one basic transaction with the Commonwealth Bank and Trust Company, in an alleged violation of 18 U.S. Code Section 1014.

Mr. Parrish was, as noted in those inductments, charged with falsely representing that he was a DuPont heir and beneficiary of a trust over $5,000,000 and being the owner of assets of $35,000,000 with a net worth of $21,000,000.

As the Plea Hearing shows, that he made the statements was not denied; nor is it now denied. Nonetheless, that factor is beside the point because of the bizarre nature of the statements and circumstances and his defenses. His post-plea Motions (under Rule 32d and Section 2255) rested on three duly verified factors not before the Court at the earlier Rule 11 hearing: (a) his mental condition, confirmed by the affidavit of a family friend, reflecting an inability to have formed the mens rea necessary for the offense; (b) the averment that there was no reliance on his statements by the bank (the original loans were by others, already defaulted, and the bank knew his statements were not a reflection of his own worth, but designed "to get the bank off the hook"); and with no reliance, therefore, there was no materiality, an essential element to the offenses; (c) that the plea hearing never dealt with specifics and did not refer to the reliance question (neither the word nor any reference to the bank's reliance appears in it); (d) that he did not know this was his defense and that since he had

this mental defense and the nonreliance element which becomes a nonmateriality defense, he was innocent although unaware of it. His defenses then were "confession and avoidance". Yes, he said, I gave those false statements but I was not mentally responsible for them and most certainly, in the circumstances here, the subpoenaed bank records and my affidavit in evidence would show that this was not a true bank-loan arrangement, that it was for the bank's benefit to get it off the hook on bad loans to others and therefore since I did not realize the relationship of this law to those facts, I am entitled to "avoid" the criminality of those alleged statements.

What was before Judge Bryan below as "the facts" pertinent to the issue of withdrawal and not the plea, was Mr. Parrish's verified Motion, which addressed itself to that not reached or known or understood at the Plea Hearing. It said in part (App. 3-8)

> "CHARLES W. PARRISH, JR., the above named defendant, moves the Court to withdraw his plea of guilty in this cause and to enter an order directing that the same be withdrawn and that the cause proceed on his original plea of not guilty to all counts, on the following grounds:
>
> . . . 3. This defendant particularly avers that based upon what he now understands, but did not heretofore understand to be the case, he has full and complete defenses to

these charges, and that he is innocent, in that, among other things: (a) the alleged transaction and matters charged in the inductment did not involve a statement that was in fact or was intended to be material to any loan arrangement; (b) the alleged transactions and matters charged in the indictment did not involve activities or statements given or made 'for the purpose of influencing the action of the said bank (Commonwealth Bank and Trust Company) to approve said loan,' as is charged; (c) that in fact the defendant was the agent of the bank for the purpose of, in the words of its authorized officer, 'getting the bank off the hook' on already defaulted obligations and losses that, it now appears, the bank needed to 'cover' for Federal Bank Examiners, and the same were done for the benefit of the bank; (d) that in fact any alleged statements made were not for the purpose charged at all, since 'the transaction' had already been predetermined and allegedly made and that any statements (e.g., those attached to the indictment) were not for the purpose of influencing any bank action charged; (e) that on their very face and under the known circumstances . . . the alleged assertions, including the attached statements could not have been intended for such purpose and could now have been capable of serving such purpose as is charged; (f) that the defendant did not intend to defraud nor did he criminally intend to commit a wrong, nor were the alleged statements to have the use assertedly

charged or the matters charged; (g) that he did not fully understand that such facts or factors were a defense to the charges or that they would render him innocent, and that, therefore, he not only acted under a mistaken understanding but he also did not intelligently and with full knowledge enter the plea or waive his rights to be tried by a jury which, he is informed, should be the body to determine his innocense or guilt upon thos e defenses; (h) and that, he is informed apart from the foregoing, which shows his right to such withdrawal under Rule 32, under the facts herein the deprivation of his jury right is a denial of his constitutional right and the acceptance of a plea and a sentence for a charge to which he has valid defenses is also a denial of constitutional right.

4. Further averring, your defendant asserts facts that are or should have been known to the United States: that in 1974 and prior to the events alleged herein, this defendant was subjected to extreme pressures and circumstances causing effects upon him which tend to show that he was not mentally capable of either forming the necessary intent of sufficiently in control of his acts to be responsible therefor. Those circumstances and pressures not only arose from the effects of his wife's deep mental illness and her actions directed to him, but that circumstance was aggravated during the very period here charged by the sudden death of his wife's daughter from an overdose of drugs. It appears that those effects on this

defendant had been and were suppressed by his own refusal to admit to himself their effect. Your defendant did not fully understand either his apparent mental condition or that it was of such severity that it would ha ve most likely put the burden on the United States to prove his mental capacity; and, that very mental impairment involves the inability to accept or see its connection with matters herein, or including those which the bank led him to do; and, it also shows his lack of intent. (App. 5-8 Ct.App.)

. . . 6. It is manifestly unjust for your defendant's plea to stand on these facts, whether they be taken separately or together.

. . . Wherefore, the premises considered the defendant, CHARLES W. PARRISH, JR., moves this Court: grant the Motions herein; set aside the judgment and sentence in this cause; direct that his guilty plea be withdrawn; and enter appropriate orders . . . ."

Mr. Parrish's Motion to Set Aside or Vacate incorporated these facts (App. 13).

The affidavit in support of these Motions, similarly setting forth "the facts in this appeal" (there being no evidentiary hearing nor dispute of it), included these statements from Anne Rogers Devereux:

"ANNE ROGERS DEVEREUX being first duly sworn, deposes and says as follows:

. . . 2. That she has known CHARLES W. PARRISH, JR. since 1969 and prior to his marriage in September 1971 to the present Mrs. Parrish. After 1969, he became almost a member of your affiant's family.

3. That by and in early or mid-1974, through a series of circumstances and events that would require a lengthy recitation that your affiant is informed should not be required now but which she will supply hereafter, CHARLES W. PARRISH, JR., was, for those who knew him, in constantly altering moods and swings of behavior, that after the death of his wife's daughter from an overdose of drugs, difficulties deepened and he spoke in terms that showed themselves to those who knew him, such as myself, that he was living in an imagined and unreal world during much of this time. His descriptions of events on some occasions were at one time dream-like and the next nightmarish. He began to drink heavily. He could not handle his wife's very deep illness....

Because of the overriding concern for his wife, neither Charles nor his friends fully appreciated that his mental condition at that time had reached a point where <u>he did not really know what he was doing</u> because, among other things, he did not know what he could do about anything; and, not being in any control of his circumstances, he lost all real ability, from my observations of his acts and the words he used, <u>to control his acts or judgment</u>. There is no doubt, from my personal observation, that he did not himself fully appreciate his mental impairment or what had happened, or was happening to him, mentally.

4. I heard statements in 1974 from Charles to the effect that the purpose of the Commonwealth arrangement was to get the bank and its officer, Nick Turner, 'off the hook.'

5. Had I been asked by the pre-sentence investigation or had I been allowed to testify at the sentencing hearing, I would have indicated the foregoing, and additional facts supportive of these observations as to his condition. . . . "

There was nothing said at the plea hearing related to bank knowledge, bank records or the like, pertaining to the <u>bona fides</u> of the transaction itself; nothing, in short, appears to have been discussed specifically to contradict directly (if it were necessary without an evidentiary hearing), the later sworn testimony in the Parrish and Devereux affidavits referred to above, that the arrangements at the bank were essentially a principal-agent relationship in which Mr. Parrish was to act in a way "to get the bank off the hook" on already-defaulted loans of other people whose loans were under federal bank examiner scrutiny; and that the loan <u>documents</u> were given for that purpose and not for a <u>bona fide</u> loan arrangements between bank and borrower.

The next hearing after sentence was not on Mr. Parrish's withdrawal Motions but rather on the Government's Motion to Quash Subpoenas for bank and FBI records that would have supported the allegations of the Motion to Withdraw. At that hearing, but one day before the ruling on the Motion to Withdraw the Guilty Plea and the Motion to Vacate,

Judge Bryan stated specifically that the hearing would be limited and concern itself primarily with "whether there is a substantial defense" (App. 59) and therefore he would quash the subpoena Mr. Parrish issued for bank records. Specifically, he said this:

> "I don't envisage a defense on the merits to the indictment tomorrow . . . and the issue . . . is whether the plea was improvidently entered, whether there is a substantial defense and whether manifest injustice would result if the plea is allowed to stand. I think that those matters can be decided without resort to the documents that you are undertaking to subpoena with your subpoenas and I think those documents are irrelevant to the limited nature of the inquiry that the Court will make tomorrow. For that reason the Motion to Quash is granted." (App. 59, emphasis added).

On the following day, the hearing was held as the Court directed -- on the basis of the affidavits before it. None were filed by the Government which relied solely on what transpired at the Rule 11 Plea Hearing.

Reduced to its material points, Mr. Parrish's argument emphasized the bizarre nature of the representations themselves in the light of the facts and circumstances that the slightest check of any bona fide transaction would have shown his true financial condition and the fact it was

not made confirmed his "avoidance" defenses, all supportive of the true nature of the arrangement as appearing in his affidavit; that the bank needed a "cover" for the federal bank examiners and found it in him; that the previous proceedings did not deal or reach these issues; that, with a maximum sentence for one single basic arrangement there was no truly bargained plea; that Mr. Parrish was not made aware of the materiality defense; that he had the mental condition noted in the affidavits not addressed at the plea; and that, in sum, he raised the kind of substantial defenses the Court alluded to the day before and the Motion to Quash all reflected in the sworn-to pleadings (App. 5-8; 10-12, 65-71). It was then again emphasized that the falsity of the financial statements was not in issue, but rather their bizarre nature and materiality . . . the avoidance and not the confession. (App. 65-66).

At the conclusion of argument, the trial Court stated that it found no "manifest injustice . . . warranting setting aside (the) plea of guilty." In doing so, it recognized that "(there) may have been arguably a defense . . . the materiality of the false financial statements may have been arguable." (App. 76). However, said the Court, Mr. Parrish made no claim of innocence at the plea hearing; and further, "defendant knows better than anybody else whether he is guilty or not" (App. 76). The court did not address itself to whether Mr. Parrish had raised the substantial defense referred to the day before, although it recognized that materiality may have been arguable. Nor did the court address itself

in its ruling, as to whether the mixed questions of law and fact that the defense invoked, are properly attributable to an intelligent waiver of a non-lawyer defendant. There was, of course, no evidence contrary to Mr. Parrish's affidavit, that the materiality defense was known or specifically considered by or discussed with counsel. The court instead appears to have rested its decision on the fact that, in spite of the complicated legal nature of this defense, that the "defendant knows better than anybody whether he is guilty or not . . ." (App. 76). It also dismissed the mental disease claim as a defense to the charges on the ground that it did not show incompentency to understand the charges. (Pet. App. herein ; App. 76-77 Ct. App.)

REASONS FOR GRANTING THE WRIT

The writ should be granted to settle conflicts in the Circuits and interpretations of decisions of this Court indicating when and under what circumstances post-guilty plea assertions which are either in conflict with statements at the Rule 11 hearing or involve matters not mentioned at the Rule 11 hearing, require an evidentiary proceeding under Rule 32d, Federal Rules of Criminal Procedure; and this is particularly so when there are claims of innocence; and further the writ should issue to settle under what circumstances a Rule 32d or Section 2255 proceeding may require a shift of the burden to the Government, or may require an evidentiary hearing in the face of claims of innocence where, as here, it is asserted that the defendant did not understand the legal effect of the legal principles applicable to the admitted facts and under those legal principles there were complete defenses to the charges.

The first reason for granting this Writ is to settle, among the Circuits, when and under what conditions the transcript of a federal sentence hearing will authorize the denial of an evidentiary hearing by a federal court presented with a Motion to Withdraw or Vacate after sentence. We thought that at least by implication, Fontaine v. Hall, 411 U.S. 213 (1973), and Henderson v. Morgan, ____U.S.____, 96 S.Ct. 2253(1976) should have indicated or answered that question for the multiple cases such as this where new facts are alleged.[1]

We also thought that this Court's observations in McCarthy v. United States, 394 U.S. 459, 464, 465, 467 (1969) were to guide the federal courts in matters of this sort. There it said that the purpose of establishing the factual basis of a plea is to eliminate any question about what is intrinsic or assumed, and that no plea can be intelligently made unless a defendant possesses an understanding of the law (i.e. materiality at bar) in relation to the facts (non-reliance); and finally, that the purpose of a full Rule 11 hearing is in part to protect the defendant who admits certain conduct (as here) but does not realize that that conduct does not always constitute the offense with which he is charged (also, as here). See McCarthy v. United States, 394 U.S. at 464-465, and especially 467.

1/ That these new elements make out proper defenses seems clear from Smith v. United States, 230 F.2d 935; United States v. Kramer, 500 F.2d 1185; cf. United States v. Tokopf, 514 F.2d 597, Kienlen v. United States, 379 F.2d 20, 27.

Fontaine v. United States, 411 U.S. 213, appears to require this hearing.

The conflict between the Circuits on the evidentiary hearing seems plain, with the Fourth Circuit in effect ruling that the Plea hearing is nearly conclusive. See and compare: United States v. Battle, 447 F.2d 950 (5th Cir. 1971), United States v. Mainer, 383 F.2d 444 (3rd Cir. 1967), with the result here. And also compare those cases and that of the Ninth Circuit in Mayes v. Pickett, 537 F.2d 1080 (9th Cir. 1976) with this cause and the Fourth Circuit in Crawford v. United States, 519 F.2d 347 (4th Cir.1975), Jones v. United States, 437 F.2d 93 and United States v. Bluso, 579 F.2d 473.

The importance and meaning of Henderson v. Morgan does not appear clear to the Circuits. This record and cause will clarify that question.

So too does this cause afford an opportunity to examine North Carolina v. Alford, 400 U.S. 25 (1971) in the light of federal principles and rules and standards.

We argued below the misreadings of Alford and its special facts where a "plea bargain" is struck in the face of either a then-made or later claim of innocence. In Alford (a) this Court was dealing with constitutional minima not the federal rules; (b) Alford insisted on acceptance of the plea; (c) the lower Court held a hearing; (d) he understood the relation of the law to the facts; (e) this Court there emphasized that where there are assertions of innocence (as here) "without more", a guilty plea is "invalid since (an) assertion of innocence negative(s) any admission of guilt which, as we observed last term in Brady is normally 'central to the plea and the foundation for entering judgment... 397 U.S. at 748." North Carolina v. Alford, 400 U.S. at 32, and (f) in fact he did not receive a maximum.

The true impact of these observations on a federal 32d and/or 2255 hearing do not appear to have been considered or expressed by this Court with sufficient clarity properly to guide the Federal Courts of Appeals. The relation of Henderson and Alford is misunderstood.

Related to this last observation in Alford is the issue of whether or not in any 32d proceeding the claim of innocence does not render the Rule 11 proceeding irrelevant. Alford, after all was about "minima"; 32d is about "manifest injustice". If a claim of innocence generally renders a plea "invalid" without more, does it not also, in a Rule 32d proceeding, prima facie make out a basis for withdrawal, with the burden on the Government to show prejudice and justification if "manifest injustice" is not to be avoided ?

In the case at bar, Mr. Parrish did not know of his "avoidance" defense and yet he needed to if his plea were to meet McCarthy cautions. Further, both the lower Court and the Fourth Circuit have assumed and ruled that the Rule 11 transcript is all, in spite of either conflicts between it and the post-plea Motions or its silence on the issue (here, reliance). Only an evidentiary hearing can meet that demand.

This Court should speak clearly to these issues; and this case not only provides the facts but the reasons to do so.

CONCLUSION

For the foregoing reasons the petition for

a writ of certiorari should be granted.

Respectfully submitted,

February 3, 1977

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Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 76-1456

United States of America,

Appellee,

versus

Charles W. Parrish, Jr.,

Appellant.

No. 76-1604

United States of America,

Appellee,

versus

Charles W. Parrish, Jr.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued October 7, 1976 Decided November 19, 1976

Before HAYNSWORTH, Chief Judge, BUTZNER and WIDENER, Circuit Judges.

PER CURIAM:

Parrish was indicted on three counts of violating 18 U.S.C. § 1014 for furnishing materially false statements in an application for a loan submitted by him to the Commonwealth Bank and Trust Co. of Virginia for the purpose of influencing the bank in approving the loan he was seeking. He was charged with falsely representing that he was a DuPont heir and the beneficiary of a trust of over $5,000,000 and being the owner of assets of $35,000,000 with a net worth of $21,000,000.

Pursuant to a "plea-bargain" arrangement, defendant pleaded guilty to count one in exchange for dismissal of counts two and three. The trial judge accepted the guilty plea after a Fed. R. Crim. P. 11 hearing, and a month later sentenced the defendant to a two-year prison term. Ten days after sentencing, Parrish retained new counsel who filed several motions including a verified motion to withdraw defendant's guilty plea and a verified motion to set aside or vacate the sentence, which were denied.

In his motions Parrish contends that he is innocent, and that he has full and complete defenses which he did not fully understand previously to be such defenses as to render him innocent. He says that the denial of his Rule 32 motion would be a manifest injustice.

Defendant's Rule 11 hearing is part of the record. The trial judge fully complied with that rule, and questioned the defendant carefully using the words

"materially false statements." Parrish's plea was voluntarily and intelligently made, with the aid of counsel and based on facts that support the charge.

The decision of the trial judge is accordingly affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 76-1456/1604

FILED
January 4, 1977

U. S. Court of Appeals
Fourth Circuit

United States of America, Appellee	)	
vs.	)	ORDER
Charles W. Parrish, Jr. Appellant	)	

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing en banc, and with the concurrence of Judge Butzner and Judge Widener,

IT IS ORDERED that the petition be, and the same is hereby, denied.

FOR THE COURT

Chief Judge, Fourth Circuit

December 30, 1976

Filed January 4, 1977

ON MOTIONS TO WITHDRAW AND SET ASIDE (No hearing - legal argument only)

Lower Court' Ruling
(Tr. 15-16, April 9 hearing)

THE COURT: Mr. Genn, in my view, the Rule XI (sic) inquiry, which I agree is pretty standard, negates this Defendant's present plea to the Court that a manifest injustice has been done warranting setting aside his plea of guilty. I have to agree with the United States Attorney that his principal complaint is that he received the jail sentence that he did. There may have been arguably a defense. There's arguably a defense in a lot of criminal cases, but this Defendant and his counsel -- and his counsel was an experienced trial lawyer -- in response to an inquiry as to whether he had made any claim that he was innocent of the charge, denied that he claimed that he was innocent.

The materiality of the false financial statements may have been arguable. Defendant knows better than anybody else whether he is guilty or not, and he was explained the elements of the offense and what he was charged with. He made no claim that he was innocent.

Mental disease, which he claims, may have borne on his intent, but it was not such to make him, even as alleged here, incompetent to understand the nature of the charges against him and to assist in his defense. The allegations of, or suggestions of, what he had hoped from the plea bargain is again negated by the Rule XI (six) inquiry.

The Court concludes that there has been no manifest injustice, and the motion to withdraw the plea of guilty is denied.

There are other motions, however, on the docket.

MR GENN: Court please. I am not going to address myself to what the Court has already ruled on, obviously. I take strong exception to the concept that the Rule XI covered the aspect of materiality at all. I don't think there is any reference to it.

THE COURT: All right, sir. Motion to set aside, vacate, or modify the sentence is denied, and the motion for the Defendant to be released pending the Maryland trial is denied. Defendant remanded to the custody of the Marshall (sic).

No. 76-1073

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES W. PARRISH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1976, and a petition for rehearing was denied on January 4, 1977 (Pet. App. 4). The petition for a writ of certiorari was filed on February 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court abused its discretion in denying petitioner's post-sentence motion to withdraw his guilty plea.

STATEMENT

1. On January 6, 1976, an indictment filed in the United States District Court for the Eastern District of Virginia charged petitioner with three counts of making materially false statements in an application for a loan submitted to an institution insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 1014. On February 13, 1976, pursuant to a plea bargain whereby the remaining counts of the indictment would be dismissed, petitioner sought to withdraw his plea of not guilty and to enter a plea of guilty to one count of the indictment.[1]

Before accepting the guilty plea, the district court conducted an inquiry as required by Rule 11, Fed. R. Crim. P. The court first ascertained that petitioner, a college graduate, understood that he was charged with "voluntarily and intentionally, and not because of mistake or accident or other innocent reason, making a materially false statement in an application for a loan submitted * * * to the Commonwealth Bank and Trust Company of Virginia * * *," by falsely stating in the application that he was the recipient of a $5,500,000 irrevocable spendthrift trust established by his mother, whom he alleged to be a DuPont family member (C.A. App. 28-29). Petitioner further acknowledged that he and his attorney had studied the nature of the charge and any possible defense that he might have to it and that he was aware that, if his guilty plea were accepted, he could be imprisoned for as long as two years and fined $5,000 (C.A. App. 29). The court then

[1]In return for the dismissal of the two counts, petitioner agreed to plead guilty to count one of the indictment, to appear before the grand jury and testify concerning the underlying facts of the case, and to testify at any subsequent trials to which he might be subpoenaed (C.A. App. 24-27). ("C.A. App." refers to the appendix to petitioner's brief in the court of appeals.)

advised petitioner that by pleading guilty he would waive certain constitutional rights, including trial by jury, the presumption of innocence, the requirement that the government prove his guilt beyond a reasonable doubt, the right to summon and cross-examine witnesses, and the privilege against self-incrimination. Petitioner replied that he understood these consequences and that his decision to plead guilty was not induced by threats or promises other than the terms of the plea bargain that had previously been described by the Assistant United States Attorney (C.A. App. 30-31).

At the court's request, the government attorney then summarized the evidence against petitioner, concluding by stating that "at that time [petitioner] submitted such application he knew so and did so with the intention of gaining the loan from the bank" (C.A. App. 33). Petitioner remarked that he did not disagree in any way with the government's recitation of the evidence, that he was making no claim of innocence, and that he understood that, if the court accepted his plea, there would be "no further trial of any kind" and he would be found guilty (C.A. App. 33-34). In light of the foregoing, the court concluded that the plea was voluntarily and knowingly made and had a basis in fact. It therefore accepted the plea to count one of the indictment (C.A. App. 34).

2. On March 12, 1976, when petitioner appeared for sentencing, his counsel offered the testimony of three witnesses, including Anne Rogers Devereux, in support of petitioner's request for leniency. Counsel explained that petitioner's wife had been hospitalized for a serious mental condition on numerous occasions and that, if petitioner were incarcerated, his wife might repeat previous attempts to commit suicide (C.A. App. 39). Counsel also

advised the court that petitioner had suffered serious financial setbacks and that his witnesses would testify that he made "the false statements which he has pled guilty to" in order to further a business proposition that, petitioner felt, would permit him to care for his family (C.A. App. 40). When the judge remarked that he did not believe that he should be influenced in his sentence by the possibility of the suicide of petitioner's wife, counsel responded (C.A. App. 41-42):

> It was offered in the sense that this is the family situation [petitioner] is in. It's a condition which existed at the time that he engaged in this offense. It goes partly to the reasons that he had for committing the offense.
>
> He is not attempting to exculpate himself by that. He is simply trying to, through me, to give Your Honor some idea of the family situation he is in * * *.

Petitioner's counsel then described in detail the background of the false loan application. Counsel stated that petitioner, who previously had been involved in the development of apartment dwellings and other types of real property, had been advised by an officer of the Commonwealth Bank that a trailer park was failing financially because its owners were utilizing funds from the operation of the park for other ventures. The bank officer suggested that petitioner might be able to help restructure the financing of the trailer park. According to petitioner's counsel, the false loan application that petitioner subsequently submitted to Commonwealth Bank was intended to secure funds to pay off arrearages in interest and principal owed to the bank by the previous owners of the trailer park (C.A. App. 42-44). Counsel added that "[t]here is no question that [petitioner] falsified his financial worth and made a false statement to the bank

in order to secure the loans, in an attempt to revive this business," and that "[t]here is no excusing what [petitioner] did in the sense that it was right or justified * * * " (C.A. App. 45, 46).

Finally, petitioner told the court that "I realize I made a terrible mistake, which I am certainly very sorry for" (C.A. App. 47). He was then sentenced to two years' imprisonment (C.A. App. 48).

3. On March 22, 1976, ten days after sentencing and after retaining new counsel, petitioner moved to withdraw his guilty plea pursuant to Rule 32(d), Fed. R. Crim. P. Petitioner contended that he had not fully understood the charge against him (*i.e.*, that the false statement in the application had to be material) and that he had a complete defense to the charge (*i.e.*, that he was acting merely as an agent for the Commonwealth Bank to permit the bank to cover from federal bank examiners the losses it had incurred on defaulted obligations arising out of the trust it held on the trailer park). Petitioner also alleged that he had been mentally incompetent at the time that he filed the application for the bank loan, because he had been subjected to extreme pressures brought about by his wife's mental illness and the sudden death of his stepdaughter from an overdose of drugs (C.A. App. 5-8). In support of this latter claim, petitioner submitted an affidavit from Mrs. Devereux, an old family friend who was neither a medical doctor, psychiatrist nor psychologist, which expressed her opinion that, as a result of family problems, petitioner had "lost all real ability * * * to control his acts or judgment" and that "he did not himself fully appreciate his mental impairment or what had happened or was happening to him, mentally" (C.A. App. 11).

On April 9, 1976, the district court held a hearing on petitioner's plea withdrawal motion.[2] The Assistant United States Attorney advised the court that, in addition to his admissions of guilt at the Rule 11 proceeding, petitioner had admitted every material allegation in the indictment in an interview in the United States Attorney's Office with his counsel present and had done so again when he testified before the grand jury (C.A. App. 72). The government attorney also observed that Mrs. Devereux was not a medical expert, that petitioner had not attempted to present psychiatric testimony in his behalf, and that petitioner had refused to waive the attorney-client privilege to allow his first attorney to testify about matters relevant to the motion to withdraw the plea. Finally, government counsel informed the court that petitioner's purported defenses were baseless and that the prosecution had had a number of witnesses who were prepared to testify at trial to refute those claims (C.A. App. 73-74).

The district court denied the motion to withdraw the guilty plea, finding that petitioner had not demonstrated that it would be manifestly unjust to hold him to his plea. The court ruled that petitioner's Rule 11 proceeding had been adequate, that petitioner had been represented by competent counsel and had freely admitted his guilt with knowledge of his possible defenses, and

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[2]The day before, April 8, 1976, the court had quashed subpoenas served by petitioner on the Attorney General, the Director of the Federal Bureau of Investigation, and the Commonwealth Bank, finding that the material sought to be presented would have no bearing on the question of whether "the plea was improvidentally [*sic*] entered, whether there is a substantial defense and whether manifest injustice would result if the plea is allowed to stand" (C.A. App. 59).

that petitioner's principal motivation for the plea withdrawal was not his innocence but rather his unhappiness with the sentence imposed (Pet. App. 5). The court of appeals affirmed *per curiam* (Pet. App. 1-3).

ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion in denying petitioner's post-sentence motion to withdraw his guilty plea. As noted above, the record of the Rule 11 proceeding established that petitioner understood the nature of the charges against him. See *Henderson* v. *Morgan*, 426 U.S. 637, 640 n. 6; *McCarthy* v. *United States*, 394 U.S. 459, 466. Petitioner acknowledged at the time of his plea that he had informed his attorney of all the facts known to him and that they had studied the "nature of the charge and any possible defense" he might have to it (C.A. App. 29). In addition, the court had expressly advised petitioner that he was charged with knowingly "making a *materially* false statement" (*id.* at 28; emphasis added) and petitioner had remarked that he did not disagree with the government's comment that the evidence would show that petitioner had made the false statements "[f]or the purpose of influencing the bank in [his] loan application" (C.A. App. 32, 33). Accordingly, as the court of appeals held, petitioner's plea "was voluntarily and intelligently made, with the aid of counsel and based on facts that support the charge" (Pet. App. 3).[3]

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[3]There is no reason to hold this case pending the outcome of *Blackledge* v. *Allison*, certiorari granted, No. 75-1693, October 4, 1976, or *United States* v. *Mayes*, pending on petition for a writ of certiorari, No. 76-989. The issue in those cases is whether a prisoner who moves to vacate his sentence on the ground that

Nor was petitioner entitled to withdraw his guilty plea on the basis of his allegation that he had a valid defense to the charge. As the District of Columbia Circuit has recently noted:

> Were mere assertion of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right. There are few if any criminal cases where the defendant cannot devise some theory or story which, if believed by a jury, would result in his acquittal. A guilty plea is very typically entered for the simple "tactical" reason that the jury is unlikely to credit the defendant's theory or story. * * * Indeed, so long as a factual basis for the plea exists, * * * a court may accept such a "tactical" guilty plea even from a defendant who continues to assert his innocence. North Carolina v. Alford, 400 U.S. 25 (1970). Surely, such a defendant does not retain a right automatically to withdraw his plea. A guilty plea "frequently involves the making of difficult judgments." McMann v. Richardson, 397 U.S. 759, 769 (1970); *see also* Brady v. United States, 397 U.S. 742, 757 (1970).

United States v. *Barker*, 514 F. 2d 208, 221 (C.A. D.C.), certiorari denied, 421 U.S. 1013 (some citations omitted).

Here, faced with the overwhelming evidence of the falsity of the statements he made in his loan application and the likelihood of conviction on all three counts of the indictment, petitioner knowingly and intelligently

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his plea had been induced by threats and broken promises is entitled to an evidentiary hearing when his allegations are expressly rebutted by statements he made at the guilty plea proceeding. Here, petitioner was given a hearing on his motion to withdraw his plea of guilty.

chose to plead guilty to a single count and to cooperate with the government in the hope of receiving a minimal sentence. His disappointment with having received a sentence of two years' imprisonment does not constitute manifest injustice.[4]

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[4]In any event, petitioner's purported defenses to the indictment are insubstantial. Even if petitioner were correct in assuming that the bank did not rely on his false statements in approving the loan, his conduct would still have violated Section 1014 because the gravamen of that offense is the filing of a false statement "for the purpose of influencing in any way" the actions of the lending institution. *Kay* v. *United States*, 303 U.S. 1, 5-6; *United States* v. *Braverman*, 522 F. 2d 218, 223 (C.A. 7), certiorari denied, 423 U.S. 985; *United States* v. *Sabatino*, 485 F. 2d 540, 544 (C.A. 2), certiorari denied, 415 U.S. 948. Without supporting documentation for the substantial loan, federal bank examiners and, indeed, the bank's own auditors would have become suspicious. Accordingly, petitioner's false statements regarding his financial worth had the "capacity to influence" the lending institution. See *United States* v. *Braverman*, *supra*, 522 F. 2d at 223; *United States* v. *Tokoph*, 514 F. 2d 597, 603 (C.A. 10).

Similarly, even if the lay observations of Mrs. Devereux about petitioner's mental state at the time of the offense were accurate, petitioner does not allege that he suffered any mental incapacity at the time of his guilty plea. Moreover, any doubt concerning petitioner's criminal intent at the time of the loan application was dispelled at the sentencing hearing, when petitioner's counsel described the scheme that petitioner had devised, stated that he had discussed the events with petitioner, and admitted that petitioner had acted for the express purpose of reversing business losses he had suffered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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